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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 739

GIBRALTOR AMUSEMENTS, LTD.,
Petitioner and Bankrupt-Appellant,

—against—

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM F. WADSWORTH and THE NATIONAL BANK OF WESTCHESTER, Petitioning Creditors, Intervening Creditor, and M. HALLSTED CHRIST, Trustee,
Respondents.

BRIEF FOR RESPONDENT-TRUSTEE IN BANKRUPTCY

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Statute Involved

Although petitioner purports to present a question involving General Order in Bankruptcy 21(6), this respondent respectfully submits that the General Order should be read in conjunction with Section 57k of the Bankruptcy Act (11 U. S. C. 93k), which reads as follows:

"Claims which have been allowed may be reconsidered *for cause* and reallowed or rejected in whole or in part *according to the equities of the case*, before but not after the estate has been closed" (emphasis supplied).

Statement of Case

An involuntary petition in bankruptcy was filed against Gibraltor Amusements, Ltd. in the Eastern District of New York on March 18, 1960. After an extended trial of the issues raised by the involuntary petition as amended and the bankrupt's answers, the Referee, *inter alia*, "held that the alleged debts (of petitioning creditors and others) and acts of bankruptcy had been amply proven" (see 291 F. 2d at 24), and entered an order of adjudication on August 19, 1960, which was affirmed by the District Court (187 F. Sup. 931), and by the United States Court of Appeals (291 Fed. 2nd 22), and an application for a Writ of Certiorari was denied in December 1961 (368 U. S. 925).

In December 1963, the Respondent-Trustee applied to the District Court for an order approving his account and directing distribution of the estate. At that point in the administration of the estate, one Larry Leon, claiming to be the "newly elected president" of the bankrupt, moved to vacate the order of adjudication referred to above. Among other things, he alleged various frauds by the three petitioning creditors and challenged their rights as creditors.

The petition to vacate the order of adjudication was denied by the Referee and by the District Court and affirmed upon the opinions below by the United States Court of Appeals on February 4, 1965. (No official or unofficial citation). An application to this Court to enlarge the time within which to file a petition for a Writ of Certiorari was denied on May 7, 1965 by Mr. Justice Harlan in the following language:

> "I consider the chance of certiorari being granted too remote to justify an extension of petitioner's time, the effect of which would be to delay distribution of this estate for the summer. Application denied."

In the meantime, the counsel for the said Larry Leon, "President" of the bankrupt, acting for the bankrupt, directed a letter to the Trustee, challenging the validity and amount of various claims of creditors, including each of the three petitioning creditors.

The Trustee, therefore, in February of 1965, petitioned the Referee in Bankruptcy for instructions as to whether further steps should be taken to litigate these claims and due notice of the application was given to the bankrupt and to the various creditors involved. The Referee in view of the long history of litigation and the record evidence with respect to the claims of the petitioning creditors, ruled that no further action with respect to the claims should be taken (Appendix F), and an appropriate order was entered on March 9, 1965 (Appendix E), which was affirmed by the District Court on June 2, 1965 (Appendix D), and by the United States Court of Appeals on July 26, 1965 (Appendix C), with a petition for a rehearing en banc denied on August 17, 1965. It is this order which is now presented to this Court for possible review.

The Question Presented by Petitioner Upon This Application is Academic

The lower courts have already considered at length all of the arguments of counsel for the bankrupt and have decided, in their discretion, that the claims to which the bankrupt has raised objection should not be further litigated.

It is of little import that the issue was joined by a petition of the Truste for instructions upon notice to the bankrupt rather than by separate petition of the bankrupt. Indeed, General Order 21(6) refers to a petition for reconsideration by either "the trustee or any creditor or the bankrupt or debtor".

Nor was the Bankruptcy Court under a mandate to grant the petition for reconsideration as urged by the bankrupt.

Section 57k of the Bankruptcy Act, permits reconsideration of claims "for cause * * * according to the equities of the case". Whether or not there is sufficient cause for reconsidering the allowance of claims lies in the sound discretion of the Court.

McLeod v. *Boone* (C. C. A. 9th Cir.) 91 Fed. 2d 71;

Blanke Mfg. & Supply v. *Winnfield Light & Ice Co.* (C. C. A. 8th Cir.) 290 Fed. 180.

In the instant case, the Referee and the District Court found that the prosecution of further objections to the claims of creditors as sought by the bankrupt would involve the relitigation of claims already extensively litigated and adjudicated, the trial of issues lacking in substantial merit, and protracted hearings without practical value to the bankruptcy estate.

The Trustee's petition for instructions having been studied in the light of the issues raised by the bankrupt and ruled upon by the Referee, and confirmed by the District Court, the question proposed by this petition for certiorari seems academic. The bankrupt was not denied an opportunity to be heard on a petition for reconsideration. It merely failed to persuade the Court that reconsideration was necessary or advisable.

Certainly, this petition for a Writ of Certiorari presents no Federal question of substance or a decision of a Court of Appeals which is in conflict with the decision of another Court of Appeals, or any consideration set forth in Rule 19 of the Rules of this Court.

The Order Denying the Petition for Reconsideration is not Appealable

Although this point has not been raised in the District Court or the Court of Appeals, Respondent-Trustee now urges that in any event the order of the Referee which in effect denied reconsideration of claims theretofore allowed is not appealable.

> *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-150;
>
> *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131.

The rule is summarized in 3 Collier on Bankruptcy, 14 Edition, 370 as follows:

> "Whether or not a petition for reconsideration will first be granted is within the sound discretion of the Bankruptcy Court (Referee or Judge) and a review or an appeal may not be taken from a denial thereof."

This bankruptcy case has been pending for more than five years. As this Court said in *Gandesk* v. *Pan American Airways, Inc.*, 86 S. Ct. 153, "litigation must at some point come to an end".

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DISMISSED UPON THE GROUND THAT THE ORDER DENYING RECONSIDERATION IS NOT APPEALABLE OR IN ANY EVENT THE PETITION SHOULD BE DENIED UPON THE GROUND THAT NO FEDERAL QUESTION OF SUBSTANCE HAS BEEN PRESENTED.

Respectfully submitted,

JOSEPH JASPAN,
Attorney for Respondent-Trustee.